

MEMORANDUM OF LAW

DATE: September 18, 1992

TO: Alberto P. Rechany, Contract Specialist, Clean
Water Program

FROM: City Attorney

SUBJECT: Alternative Specifications for Bidding Construction
of North City Water Reclamation Plant

This answers the question raised by your memorandum of August 3, 1992 concerning the plans of the Clean Water Program to invite bids for the construction of the North City Water Reclamation Plant. You inquired about the legality of using alternative specifications for the bidding of the project. One proposal is to have the entire project bid as a single prime contract, while the alternative proposal would be to have the same project bid under several prime contracts. The question is whether both alternatives may be advertised and bid concurrently.

ANALYSIS

Public work contracts which have a cost in excess of \$50,000 must be awarded according to a sealed competitive bidding process following proper public advertising. San Diego City Charter ("Charter") section 94; San Diego Municipal Code ("SDMC") sections 22.0211, 22.0504. You have informed by telephone that if construction of the North City Reclamation Plant is to be bid as several contracts, the engineer's cost estimate for each of those several contracts certainly would still exceed \$50,000. Thus, the proposal to let multiple contracts can not be viewed as a design to avoid the competitive bidding threshold, so the legal prohibitions against this need not be addressed.

The issue is simply whether an alternative and concurrent bidding process is legal. On this point, Charter section 94 provides in pertinent part that "any contract may be let for a gross price or on unit basis" This is interpreted to mean that the contract may be let as a whole based on the aggregate bid, or it may be let according to the lowest bid for unit components which collectively constitute the whole. Although the Charter provision refers to "contract" in the singular, the practical effect of aggregating low bids for units

of that contract could result in the actual letting of several contracts to attain that singular objective. Therefore, we see no legal difficulty in the proposal to construct the plant by the letting of several contracts.

The problem is thus reduced to determining if there is any prohibition against advertising multiple unit contracts at the same time a single contract for the same project is advertised. Of course, only one of the proposed alternatives--multiple or single--would be awarded, and those bidders for the alternative not awarded would necessarily be rejected. In this respect, the rejection of any and all bids is not legally problematic, as Charter section 94 affords the City Council this express authority for any advertised contract. From a purely legal perspective, then, the advertisement of alternative specifications would be permissible.

However, we do have some reservations about the equitable aspects of this proposition. "The term 'equity' denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men between men [O]n this sense its obligation is ethical rather than jural, and its discussion belongs to the sphere of morals. It is grounded in the precepts of the conscience, not in any sanction of positive law." *Gilles v. Department of Human Resources Development*, 11 Cal. 3d 313, 322 (1974); citing *Black's Law Dictionary* 634 (4th ed. 1957). Thus, while there may exist no legal prohibition against the proposed alternative bid specifications, the City should remain mindful that it also has an equitable obligation of fairness to bidders.

Since bidders will be subject to considerable expense in merely preparing bids for the project (especially those interested in the single comprehensive contract alternative), the City, in all fairness, should advise them in unequivocal terms that the contract might be awarded pursuant to either but not both of the alternative specifications. An illustrative example of a similar advisement is found in the specifications for the recently bid Point Loma Ocean Outfall Extension Project. There, the specifications notified bidders that the advertised plans, which specified a conventional outfall design, might in the end be put aside entirely in favor of an alternative design (tunneling) then being simultaneously considered by the City Council. By this advisement, bidders had fair notice of the risks entailed in going to the expense of preparing a bid for one specification which possibly would not be the subject of any contract award at all. We recommend that similar language be included in specifications for the North City Reclamation Plant

bid documents if an alternative bidding process is undertaken. Further, all bidders should be expressly notified that they may submit bids for both alternatives, should they so choose.

It would be preferable, in our view, if the alternative bidding process could be avoided. The alternative procedure would convey to bidders a sense of uncertainty regarding the City's intentions, and this in turn may result in less participation in the competition than would otherwise obtain. Also, there is the cost to the City of having to prepare and advertise alternative specifications. Moreover, the issue of equity and fairness would be obviated under a single, definite approach to the project's construction. Therefore, we think it is best that the Clean Water Program should attempt to reasonably estimate the advantages and disadvantages of each alternative, and then invite bids for only the one deemed to be in the best interests of the City. Still, if the merits of each alternative cannot be reasonably estimated, dual specifications may legally be advertised, so long as equitable considerations are made.

JOHN W. WITT, City Attorney

By

Frederick M. Ortlieb

Deputy City Attorney

FMO:js:mrh:150(x043.2)

cc William Hanley

ML-92-86

TOP

TOP